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No. 88-405

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ARTHUR DITMAR,

Petitioner,

v.

NEEDHAM HARPER WORLDWIDE, INC.,
and
ANHEUSER-BUSCH, INC.,

Respondents.

OPPOSITION OF RESPONDENTS ANHEUSER-BUSCH, INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION RESTATED

Whether plaintiff's complaint stated a claim upon which relief could be granted, where the complaint sounded in defamation, and the alleged defamatory language consisted of the rebroadcasting of a misstatement by a radio broadcaster that plaintiff had thrown a home run pitch while he was a professional baseball player in 1960, when, in fact, he had not thrown such a home run pitch?

PARTIES INVOLVED

Anheuser-Busch, Inc. has no parent company, subsidiaries, or affiliates contemplated in Rule 28.1.

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of the decision of the Sixth Circuit which upheld the trial court's dismissal of his amended complaint, pursuant to Fed. Civ. R. 12(B)(6), for failure to state a claim against Anheuser-Busch upon which relief could be granted. The amended complaint of the petitioner sounded completely in defamation. Because the complained-of statements were completely before the court by way of the petitioner's amended complaint, the court was free, as a matter of law, to determine that no defamatory language was used, and that the complaint was therefore legally insufficient to state a claim for relief.

1. On February 2, 1986, petitioner, a former major league baseball player, filed the within action against

Needham Harper Worldwide, Inc. ("Needham") and Anheuser-Busch, Inc. ("Anheuser"). The basis of the petitioner's complaint sounded in defamation. As the complaint stated:

> 7. The defendants planned, produced, and caused the television broadcasting of Budweiser Beer commercials during the Major League Baseball World Series which was conducted in Autumn, 1985.
>
> 8. One such Budweiser commercial mentioned plaintiff by name. The visual portion of the commercial depicted persons gathered around a radio set. The audio portion purported to be an announcer's voice on the radio, who reports to the listeners that plaintiff threw a 7th-game pitch in the 1960 World Series to Pirate's batter, Bill Mazeroski, who hit the pitch for a Series-winning homerun.
>
> 9. The Budweiser commercial's reference to plaintiff was false, because plaintiff did not throw the pitch which cost the Yankees the 1960 World Series.

In fact, it was former Yankee pitcher Ralph Terry, not petitioner, who actually threw the homerun pitch in question.

Needham filed a Motion to dismiss, pursuant to Fed. R. Civ. P. 12 (B)(6), alleging that the complaint failed to state a claim upon which relief could be granted. The basis of Needham's motion was that petitioner had failed to state either a claim for defamation *per se*, or a claim for defamation *per quod*, the only two types of defamation claims which exist at common law. Anheuser joined in Needham's motion to dismiss, on the basis that the substance of Needham's motion applied in identical fashion to Anheuser.

Recognizing that Needham's claim was well-founded, particularly in its assertion that petitioner had failed to plead special damages, petitioner filed an amended complaint, the substance of which was to allege that he had, in fact, incurred "special damages," in that (a) he still provided athletic instruction to various youth and adult athletic programs in Brookpark; (b) that he "still engaged in his profession as a pitcher in special "old timer's" games; and (c) that he had been paid "appearance money" as a former baseball star at certain charitable golfing events . . . "

Needham again moved for dismissal pursuant to Fed. R. Civ. P. 12 (B)(6). The same grounds were asserted in the subsequent motion as in the former. On June 25, 1987, in a memorandum opinion, the district court granted the motions of both Needham and Anheuser to dismiss.

Petitioner appealed to the Sixth Circuit. Pursuant to Loc. R. 19 of that court, the court deemed that a written opinion in the case was unnecessary, and simply affirmed the district court's order from the bench. The transcript from the bench reflects the court's reasoning that, as a matter of law, the statement that petitioner had thrown a homerun pitch (when in fact he had not) was not libelous. Accordingly, the court stated that it did not need to reach the issue of special damages.

Additionally, petitioner had attempted at the appellate level to first raise claims of invasion of privacy as well as infliction of emotional distress. The court stated from the bench that, since those actions were not plead in the district court, they were not properly before the court.

2. The question of whether certain language is defamatory is, in the first instance, *a question of law for the Court. Becker v. Toulmin* (1956), 165 Ohio St. 549. In that context, the standard for evaluating a Rule 12 (B)(6) Motion is particularly relevant. Such a motion tests the legal sufficiency of the complaint. See, e.g., *Ott v. Midland-Ross Corp.* (1975), 523 F. 2d 1367. *Where, as in the instant case, the so-called defamatory statements are contained in the complaint, the court is free, as a matter of law, to determine that the statements are not defamatory in the first instance, and, therefore, the complaint fails to state a claim for defamation.*

Indeed, the major thrust of the trial court's memorandum opinion was that the words relied upon to create the cause of action for defamation were not, in the first instance, defamatory at all. As the court stated:

> Petitioner was engaged as a recreation and athletic Director in the fall of 1985 when the publication complained of was made. The only reference in the publication, however was to petitioner's past profession. Since petitioner has not been employed as a major league pitcher since 1962, and since the pubication in no way reflects on petitioner's current profession, the publication cannot be libelous *per se. Moreover, the publication is not of a kind incompatible with the trade or profession of being a major league pitcher, nor does it generally impugn petitioner's pitching ability or connote a general want of professional skills as a pitcher. Hardly a day goes by during the course of the long baseball season when some pitcher somewhere does not deliver a homerun pitch. Homerun pitches are a fact of baseball life that any pitcher must ultimately face.* In the 1960 World Series, no less than 14 homeruns were belted out of Forbes field in Yankee Stadium. Five of these homeruns occurred in the seventh game of the

> Series. This is but one example of the alarming regularity with which hitters "take pitchers downtown."
>
> Whether a publication is libelous or not, is not to be determined from segregated parts of the publication, but from the entire publication, keeping in mind the theme of the composition, the circumstances, and the occasion. . . . Looking at the publication in this context, and interpreting the alleged defamatory statement in the light most favorable to the Petitioner, *this court finds that there is no actionable language.* The motions of Anheuser and Needham to dismiss this cause of action for failure to state a claim are hereby granted. (emphasis added.)

For the reason advanced by the district court, there certainly can be no claim of error with respect to its finding that the words relied upon by the petitioner were not, in the first instance, defamatory at all. Since, as the district court stated, it is not defamatory for a pitcher to be accused of throwing a homerun pitch, for the reason that pitchers routinely throw homerun pitches, there was nothing defamatory *per se* about the publication, neither was there any "innuendo" which would have made the publication defamatory *per quod*. Quite plainly, there was no error in the court's reasoning or determination that the very words relied upon by the petitioner in his complaint did not state a cause of action for defamation.

As a consequence, the Sixth Circuit correctly determined that the district court was free to dismiss the petitioner's claim pursuant to Fed. R. Civ. P. 12 (B)(6). It is the duty of the court, as a matter of law in the first instance, to determine whether the complained-of language constitutes defamation *per se* or *per quod*. *Becker, supra; Matalka v. Lagemann* (1985), 21 Ohio App.3d 134. *Since the court did determine, as a matter of law, that there*

was not defamatory language used, the court necessarily found that the complaint was legally insufficient to state a claim for relief under a theory of defamation. Accordingly, the Sixth Circuit correctly ruled that the 12 (B)(6) motion was appropriately granted by the district court.

3. Because the complained-of language was not defamatory in the first instance, it did not matter whether special damages had been plead properly or not. As co-respondent Needham has correctly pointed out, petitioner failed in both his initial complaint and his amended complaint to properly plead special damages. Nevertheless, it should also be apparent that, since the language that the petitioner complained of was not at all defamatory, it made no difference whether he ever plead special damages appropriately or not.

As stated *supra*, the question of whether the publication or communication was defamatory in the first instance was a question of law for the trial court. Thus, only if the trial court had found that there had been defamatory matter communicated would there have been a need to turn to the second step, and ascertain whether, in addition to the defamatory matter, the petitioner had plead special damages. While the trial court relied heavily on the absence of special damages as the basis for eliminating libel *per quod* as a possible cause of action, it is nevertheless true that the court found that, based upon the character of the publication, "there is no actionable language."

Accordingly, that there were no special damages was but another reason why the complaint failed to state a claim for relief. Nevertheless, from what has just been

stated, even if there had been special damages properly plead, the complaint would still have failed to state a claim. If a claimant properly pleads the damage aspect of the complaint, but fails to properly plead the liability aspect, the complaint fails in any event. That is precisely what happened here. No special damages had been plead, but, even had they been properly plead, they would have been divorced from any cognizable cause of action.

Accordingly, the district court was correct in dismissing the claim of petitioner, and the Sixth Circuit was correct in upholding that dismissal.

4. It was also correct for the Sixth Circuit to reject the extraneous claims of invasion of privacy and intentional infliction of emotional distress, as neither of them were raised at the trial court level. *Seegull Manufacturing Co. v. NLRB* (Sixth Cir. 1984), 741 F. 2d 882. Consequently, neither of these latter claims have been adequately preserved for this court's review.

Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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